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IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

HOBBY LOBBY STORES, INC., ET AL.,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
Petitioners,

v.

KATHLEEN SEBELIUS, ET AL.,
Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE TENTH AND THIRD CIRCUITS, RESPECTIVELY

Brief of *Amici Curiae* Massachusetts Citizens for Life, Inc., Massachusetts Family Institute, Inc., National Lawyers Association, Inc. and Pro-Life Legal Defense Fund, Inc. In Support of Non-Government Parties

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INTEREST OF *AMICI CURIAE*[1]

Massachusetts Citizens for Life, Inc. (MCFL), is a not-for-profit corporation organized under the laws of the Commonwealth of Massachusetts that is dedicated to furthering the protection of human life from conception until natural death. As such, MCFL is opposed to government regulations, like the one at issue here, which would mandate the provision of abortifacient drugs.

Massachusetts Family Institute, Inc. (MFI), is a not-for-profit research and education corporation organized under the laws of the Commonwealth of Massachusetts that is dedicated to strengthening the family and restoring moral principles to the public policy and cultural arenas. MFI is concerned about the ability of government to coerce people of conscience into cooperation with abortion.

The National Lawyers Association, Inc. (NLA), is a national bar organization incorporated as a not-for-profit under the laws of the State of Missouri. The NLA is dedicated to the principle that the Founding Fathers of the government of the United States of America established a governmental structure for the Nation consisting of the Declaration of Independence and the Constitution; that the Constitution is to be

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Hobby Lobby's letter evidencing such consent has been filed with the Clerk of the Court, and all other parties have granted blanket consents. Further, pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did such counsel or party make a monetary contribution to the preparation or submission of this brief. Only *amici curiae* made such a monetary contribution.

interpreted in the light of the principles and transcendent truths set forth in the Declaration of Independence; and that the legal community has a special responsibility to preserve and protect that structure. The NLA deems the Government's actions under the HHS mandate as an unconstitutional interference with the First Amendment rights of the citizens of this Country, both individually and as employers.

The Pro-Life Legal Defense Fund, Inc. (PLLDF), is a Massachusetts not-for-profit corporation, which provides *pro bono* legal services for the protection of human life. As such, PLLDF opposes government coercive practices, like the HHS abortifacient mandate.

SUMMARY OF THE ARGUMENT

Our argument is from history: In the American legal tradition the English colonies that would become the United States of America used corporate charters, companies, compacts and contractual agreements for religious purposes and to guarantee the free exercise of religion. These legal arrangements were civil and lay or secular in character. Although historical analogy is necessarily imprecise, the best of our legal heritage favors constitutional or at least statutory recognition of religious freedom exercised by non-ecclesiastical corporations and associative entities.

ARGUMENT

The Anglo-American legal tradition, as developed during the colonial period, contains many examples where secular legal institutions and arrangements were employed to accomplish religious purposes, specifically to safeguard minority religious beliefs and practices. Before the First Amendment revolutionized world history by guaranteeing government separation from religious establishments, and the free exercise of religion, those who were in dissent from the established Anglican Church were able to use existing civil and secular legal entities to create a space to practice their religion in accord with the dictates of their consciences.

I. The English Background of Religious Freedom Through Church Corporations Shows the Importance of Both Religious Freedom and the Corporate Form for Its Exercise.

In the first chapter of Magna Carta, the 1215 charter of the rights of Englishmen, King John proclaimed that "we ... [i]n the first place have granted to God and by this our present Charter have confirmed, for us and our heirs in perpetuity, that the English church shall be free [*quod Anglicana ecclesia libera sit*], and shall have its rights undiminished and its liberties unimpaired."[2] This "meant, of course, free under the papacy from control

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[2] JAMES CLARKE HOLT, MAGNA CARTA 448-49 (2d ed. Cambridge Univ. Press 1992).

by kings or barons."[3] The English legal historian Frederic William Maitland called the Magna Carta "the nearest approach to an irrepealable 'fundamental statute' that England has ever had."[4] Consequently, at the beginning of English constitutionalism in the Middle Ages, there is a resounding affirmation of religious freedom as important and inviolable, much like that in the First Amendment of our own Constitution's Bill of Rights.

This was the first and foundational cornerstone of religious freedom of the Church from government control. It included, for example, the matter of election or choice of church personnel.[5] Of course, it was not religious freedom of the individual, or just any religious group, as we would understand it.

Indeed, one characteristic of this primordial freedom of rights and liberties is that the Church itself, its various parish churches and monasteries,

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[3] HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 263 (Harvard University Press 1983).

[4] 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, HISTORY OF ENGLISH LAW 173 (Lawyers Literary Club 1959). Interestingly, he notes that "The vague large promise that the church of England shall be free is destined to arouse hopes that have been dormant and can not be fulfilled." *Id.* at 172. However true that was in the English context, the promise was destined to be fulfilled in America.

[5] "[F]reedom of elections, which is thought to be of the greatest necessity and importance to the English church." Magna Carta, c. 1. HOLT, *supra* note 2, at 448-49. *See Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. ___, 132 S.Ct. 694, 710 (2012) ("The church must be free to choose those who will guide it on its way.")

as well as the universities of Oxford and Cambridge, were all considered corporations in the Middle Ages. As Maitland writes, "Now the idea of the Church as the mystical body of Christ has had an important influence on the growth of the law of corporations; it did much towards fashioning for us the anthropomorphic picture of the many members in one body."[6] The very word corporation is from the Latin *corpus*, meaning "body." Legal personhood of what William Blackstone would call "artificial persons" like corporations followed. Maitland titles his section on the subject "Corporations and Churches," which in the first edition he titled "Fictitious Persons."[7]

William Blackstone, writing in the years just before the United States declared independence from England, concludes his first volume on legal persons with a chapter on corporations. He distinguishes between ecclesiastical and lay corporations:

> Ecclesiastical corporations are where the members that compose it are entirely spiritual persons; such as bishops ... These are erected for the furtherance of religion, and the perpetuating the rights of the church. Lay corporations are of two sorts, *civil* and *eleemosynary*. The civil are such as are erected for a variety of temporal purposes.[8]

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[6] 1 POLLOCK & MAITLAND, *supra* note 4, at 495.

[7] *Id.* at 486-511, 486 note 1.

[8] WILLIAM BLACKSTONE, 1 COMMENTARIES *458.

Royal colonies like Virginia and New York, where Anglicanism was the established religion, were not receptive to religious dissidents like the Quakers, Baptists, Catholics, Puritans or others. The situation in charter or proprietary colonies like Pennsylvania, Rhode Island, Maryland, and even Massachusetts, was different. There minority religious practices, other than those of the established Anglican Church, could find a home relatively free from government supervision and control. This occurred in part because these colonies were run by lay and civil companies or corporations, and not by direct royal government through the established ecclesiastical corporations of the Anglican Church.

In Massachusetts Bay Colony, the Puritans were in control, and their notion of religious freedom was limited to Puritanism. In the Plymouth Colony, thirty-five of the settler Pilgrims, who arrived in 1620 "were Puritan Nonconformists, dissenters whose Calvinist beliefs made them no longer prepared to submit to the episcopal governance and Romish teachings (as they saw it) of the established Church of England."[9]

II. Plymouth and the Mayflower Compact Were An Auspicious Beginning for Religious Freedom in the New World.

The Pilgrims came to America in search of religious freedom. They were accompanied by sixty-six non-Puritans.[10] "Before they landed, it was

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[9] PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 29 (1997).

[10] *Id.*

essential that they all sign a formal and binding agreement of some sort. Over the course of the next day, they hammered out what has come to be known as the Mayflower Compact."[11]

In 1802, John Quincy Adams explained the Compact's significance at Plymouth: "This is perhaps the only instance in human history of that positive, original social compact, which speculative philosophers have imagined as the only legitimate source of government. Here was a unanimous and personal assent by all individuals of the community, to the association by which they became a nation."[12]

As Paul Johnson explains,

> What was remarkable about this particular contract was that it was not between a servant and a master, or a people and a king, but between a group of like-minded individuals and each other, with God as a witness and symbolic co-signatory. It was as though this small community, in going to America together, pledged themselves to create a different kind of collective personality, living a new life across the Atlantic.[13]

Therefore, the original contract under which the Pilgrims chose to operate was a civil, secular

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[11] NATHANIEL PHILBRICK, MAYFLOWER: A STORY OF COURAGE, COMMUNITY, AND WAR 40 (2006).

[12] *Id.* at 352.

[13] JOHNSON, *supra* note 9, at 30.

legal document, even if the underlying purpose was unquestionably religious.

III. Roger Williams's Charter for Rhode Island and Providence Plantations Protected Religious Freedom in a Path-Breaking Way.

Roger Williams, the founder of the Rhode Island and Providence Plantations colony, was exiled from the Massachusetts Bay Colony for his religious dissent. Because of his own experience of religious persecution in Massachusetts, he was in favor of a broad understanding of religious freedom. On March 24, 1644, Parliament issued a charter for the four towns there, recognizing his Instrument of Government, which, after listing "various laws and penalties for specific transgressions ... added: 'And otherwise than this, what is herein forbidden, all men may walk as their consciences persuade them, every one in the name of his God.'"[14]

After the restoration of the monarch in England, Roger Williams received a charter from Charles II confirming the privileges granted in 1644. The charter said:

> No person within the said colony, at any time hereafter, shall be in any wise molested, punished, disquieted or called in question, for any difference in opinion in matters of religion, and who do not actually disturb the civil peace of our said colony; but that all ... may from time to time, and at all times

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[14] JOHNSON, *supra* note 9, at 49.

> hereafter, freely and fully have and enjoy his and their own judgments and consciences in matters of religious concernments.[15]

As Paul Johnson observes, "The creation of Rhode Island was thus a critical turning-point in the evolution of America. It not only introduced the principles of complete religious freedom and the separation of church and state, it also inaugurated the practice of religious competition."[16]

The colonial charter was the legal instrument that allowed for more extensive religious freedom in Rhode Island than elsewhere in the British Empire.

On March 13, 1658, the General Assembly reinforced the validity of the charter.[17] The General Assembly reminded the United Colonies that

> "freedom of different consciences, to be protected from inforcements was the principle ground of our Charter, both with respect to our humble sute for it, as also to the true intent of the Honourable and renowned parlement of England in grantinge of the same unto us; which freedom we still prize as the greatest hapines that men can posess in

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[15] *Id.* at 49-50.

[16] *Id.* at 50.

[17] JOHN M. BARRY, ROGER WILLIAMS AND THE CREATION OF THE AMERICAN SOUL: CHURCH, STATE, AND THE BIRTH OF LIBERTY 377 (Penguin Group 2012) (quoting General Assembly to Massachusetts, March 13, 1658, in JOHN RUSSELL BARTLETT, 1 RECORDS OF THE COLONY OF RHODE ISLAND 478 (Providence 1856-65)).

this world." It could not allow "infringement of that chiefe principle in our charter concerning freedom of consciences."[18]

IV. William Penn and the Quakers Guaranteed Religious Freedom in Pennsylvania.

William Penn obtained what is now called Pennsylvania in compensation for a debt owed by King Charles II of England to his father, Sir Admiral William Penn.[19] Penn and his fellow Quakers strongly believed in religious freedom, and included religious toleration clauses in Pennsylvania's earliest governmental documents, the *Frames of Government*. The first Frame dates from 1682, and notably acknowledged religious tolerance in the following passage:

> That all persons living in this province, who confess and acknowledge the one Almighty and eternal God, to be the Creator, Upholder and Ruler of the world; and that hold themselves obliged in conscience to live peaceably and justly in civil society, shall, in no ways, be molested or prejudiced for their religious persuasion, or practice, in matters of faith and worship, nor shall they be compelled, at any time, to

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[18] *Id.*

[19] Historical Society of Pennsylvania, *Penn Family Papers*, http://www2.hsp.org/collections/manuscripts/p/Penn0485A.html (last visited Jan. 27, 2014).

> frequent or maintain any religious worship, place or ministry whatever.[20]

Similar language was included in a subsequent Frame of Government (1701), which was used as the *de facto* constitution for Pennsylvania for the next seventy-five years.[21] During the following decades, religious minorities such as the Huguenots, Mennonites, Amish, Catholics, Lutherans, and Jews practiced their religions openly in Pennsylvania.

V. The Calverts Sought to Guarantee Religious Freedom in Maryland.

Charles I granted the proprietary royal charter for Maryland to Cecil Calvert, Second Lord Baltimore, a Catholic.[22] The wording in the charter was vague and because of that the colony was classified as a palatinate.[23] This allowed Lord

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[20] *Art. XXXV of the Laws Agreed Upon in England in 1682 that accompanied the Frame of Government of Pennsylvania, in* THE SACRED RIGHTS OF CONSCIENCE 118 (Daniel L. Dreisbach & Mark David Hall eds., 2009).

[21] American Philosophical Society, *William Penn Charter of Privileges for the Province of Pennsylvania, 1701*, http://www.amphilsoc.org/exhibits/treasures/charter.htm (last visited Jan 27, 2014).

[22] Albert J. Martinez, Jr., *The Palatinate Clause of the Maryland Charter, 1632-1776: From Independent Jurisdiction to Independence*, 50 AM J. LEGAL HIST. 305, 309 (2008-2010); John Hartsock & Gordon Marsden, *America's First Experiment in Toleration*, 43 HISTORY TODAY, Jan. 1993, *available at* http://www.historytoday.com/john-hartsock/americas-first-experiment-toleration.

[23] Hartsock & Marsden, *supra* note 22. A palatinate state is defined as "a medieval form of political entity semi-autonomous from the crown." *Id.*

Baltimore sufficient authority to govern the colony independent of the crown.[24] With this freedom Lord Baltimore sought to establish freedom of religion in the colony. The aim was to establish a safe haven for fellow Catholics who were being persecuted by the crown. However, it soon became obvious that Catholics would be in the minority because there were not enough Catholics willing to immigrate to the New World.[25]

Once the colony was established and settlers began living in Maryland, Lord Baltimore established a policy of religious freedom. He tried to ensure that Catholics, including his brother the governor, were silent on matters pertaining to the Protestant religion.[26] The colony welcomed people of other religions besides Catholics and Anglicans, and soon Puritans, Quakers, Anabaptists, and Presbyterians began flocking to the colony.[27] This religious tolerance would continue, and in 1649 the Maryland Assembly codified religious tolerance in the *Act Concerning Religion*.[28] The Act guaranteed the freedom of worship and prohibited religious epithets by issuing harsh punishments to offending individuals.[29]

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[24] *Id.*

[25] Martinez, *supra* note 22, at 309.

[26] Hartsock & Marsden, *supra* note 22.

[27] *Id.*

[28] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1425 (1990); Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1564 (1989).

[29] Hartsock & Marsden, *supra* note 22.

VI. The Contrasting Experience in Virginia Occasioned the Expansive Views on Religious Freedom of Washington, Jefferson and Madison.

Virginia had been a royal colony since the revocation of its corporate charter in 1624, allowing the English crown to establish the Anglican Church. As a result, dissenting religions were persecuted. In contrast with the proprietary and charter colonies, where their independent corporate status allowed for greater degrees of religious freedom, direct royal government, and the resulting established church, caused Virginians of varying religious persuasions to express serious reservations about the lack of religious freedom and to adopt views more in keeping with a liberal polity.

Significantly, these Virginians, most notably James Madison and George Washington, played important roles at the constitutional convention in Philadelphia in 1787. Their views, along with those of Thomas Jefferson, did much to shape our tradition of separation of church and state with a generous allowance for religious freedom and the rights of conscience.

In his 1785 "Memorial and Remonstrance against Religious Assessments," James Madison wrote,

> A just Government instituted to secure and perpetuate [public liberty] needs [an established Clergy] not. Such a government will best be supported by protecting every Citizen in the enjoyment of his Religion with the same

> equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.[30]

In 1789, when the new United States Constitution went into effect, George Washington wrote to the Annual Meeting of Quakers in September:

> I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.[31]

Thomas Jefferson, as this Court noted in *Everson v. Board of Education of Ewing Township*,[32] wrote the famous Virginia Bill for Religious Liberty, enacted in 1786, which decreed that "no man ... shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on

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[30] JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* VINCENT PHILLIP MUNOZ, RELIGIOUS LIBERTY AND THE AMERICAN SUPREME COURT: THE ESSENTIAL CASES AND DOCUMENTS 584-85 (2013).

[31] GEORGE WASHINGTON, LETTER TO THE ANNUAL MEETING OF QUAKERS (1789), *reprinted in* MUNOZ, *supra* note 30, at 601.

[32] *Everson v. Board of Education*, 330 U.S. 1, 12 (1947).

account of his religious opinions or belief." This Court said "that the provisions of the First Amendment ... had the same objective and were intended to provide the same protection against governmental intrusion as the Virginia statute."[33]

VII. Alexis de Tocqueville's *Democracy in America* Celebrated the American Tradition of Acting in Common to Pursue Commercial as Well as Religious Ends.

Alexis de Tocqueville insisted that "the respect for individual rights is essential to democracy's preservation of liberty and human dignity."[34] Tocqueville believed that an individual's right to associate with others was essential to democracy.[35] Specifically, he stated:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow-creatures, and of acting in common with them. I am therefore led to conclude that the right of association is almost as inalienable as the right of personal liberty.[36]

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[33] *Id.* at 13 (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878); *Watson v. Jones*, 13 Wall. 679 (1871); *Davis v. Beason*, 133 U.S. 333, 342 (1890)).

[34] DELBA WINTHROP, INTERPRETING TOCQUEVILLE'S DEMOCRACY IN AMERICA 394 (Ken Masugi ed., 1991).

[35] *Id.* at 401.

[36] ALEXIS DE TOCQUEVILLE. DEMOCRACY IN AMERICA 203 (P. Bradley ed., 1954).

He famously celebrated the freedom of association in America, a phenomenon of the private sector which mediates between the individual and the state. Corporations serve a similar function:

> Americans of all ages, all stations of life, and all types of disposition are forever forming associations. There are not only commercial and industrial associations in which all take part, but others of a thousand different types--religious, moral, serious, futile, very general and very limited, immensely large and very minute. Americans combine to give us fetes, found seminaries, build churches, distribute books and send missionaries to antipodes. Hospitals, prisons, and schools take shape in that way. Finally, if they want to proclaim a truth or propagate some feeling by the encouragement of a great example, they form an association. In every case, at the head of any new undertaking, where in France you would find the government or in England some territorial magnate, in the United States you are sure to find an association.[37]

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[37] *Id.* at 242.

VIII. The Massachusetts Bay Colony Produced a Mixed Legacy of Religious Freedom: Religious Freedom for Me but Not for Thee.

The Massachusetts Bay Colony was founded by the Massachusetts Bay Company. King Charles I granted the Company a charter in 1629 to establish the Massachusetts Bay Colony. The Company was a "group of merchants, gentry, and clergy" that sought to establish a colony along the New England coast.[38] Most of the members of this company were of the Puritan faith.[39] Underlying the granting was the knowledge that the Puritans were a direct challenge to the governmental system of England; they were growing in numbers and possessed wealth and rank.[40]

For the Puritans the venture was a religious one and not economic, as they finally had the opportunity to purify the church.[41] "The Puritan Revolution was conceived to be a restoration of the ancient liberties of Englishmen as laid down in Magna Carta and other medieval statutes and judicial decisions prior to the usurpation of supreme power over church and state by the Tudor-Stuart monarchy more than a century earlier."[42]

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[38] RICHARD S. DUNN, PURITAN AND YANKEES: THE WINTHROP DYNASTY OF NEW ENGLAND 1630-1717 6 (1962).

[39] EDMUND S. MORGAN, THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP 46 (1958).

[40] *E.g.*, DUNN, *supra* note 38, at 11.

[41] MORGAN, *supra* note 39, at 45.

[42] HAROLD J. BERMAN, LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION 206 (Harvard University Press 2003).

The most interesting aspect is that they used a secular legal structure, the business company, to serve their religious freedom. In other words, their dissenting religious practices found shelter in institutions of civil, not religious, law. King Charles I's general policy left the colonization up to the company who received the charter.[43] The Massachusetts Bay Company charter followed this policy by giving the stockholders the power of ownership and government over the designated area.[44] Due to the ambiguity of the charter, the Massachusetts Bay Company was able to move its whole operation to the New World.[45]

England's toleration for the Puritan settlers soon began to diminish. The Archbishop of Canterbury, William Laud, opposed anything having to do with the Puritans.[46] As reports of the Massachusetts Bay Colony becoming separatists flowed into England, Archbishop Laud took it upon himself to attempt to revoke the charter.[47] Around this time the Massachusetts Bay Colony began to exercise its own intolerance. While not every person with opposing views was persecuted, those who were zealous and preached the opposing views were exiled

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[43] DUNN, *supra* note 38, at 27.

[44] MORGAN, *supra* note 39, at 45.

[45] *Id.* at 46. The royal charters were supposed to state where the company would hold its meetings. London was usually the location, but the Massachusetts Bay Company's charter was silent on this matter, allowing the company to move everything to the New World. *Id.*

[46] DUNN, *supra* note 38, at 30.

[47] *Id.* at 30-31 (detailing Bishop Laud's Commission for Regulating Plantations).

or executed.[48] The intolerance towards others with opposing religious views continued despite repeated pleas from English Puritans calling for the colonists to be more tolerant.[49] In fact, around 1646-47 a group petitioned the reformed Parliament to step in to force the Massachusetts Bay Colony to be more tolerant of other religions, as England had become.[50] Despite the many pleas from England to become tolerant of other religions, the Puritans of Massachusetts continued their persecution. This trend continued until the royal charter was officially revoked in 1685.[51]

Around this same time King James II ascended to the crown, and the Anglican Church began to take hold of power in the colony. This would continue until the colonists revolted against the throne in what has been called the Glorious Revolution. In 1691 King William and Queen Mary granted a new charter to the Massachusetts Bay Colony. Unlike the 1629 charter, this put the colony under the power of the throne and subjected them to all English laws including the freedom of worship.[52]

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[48] *Id.* at 19-20 (discussing the exiling of Anne Hutchinson, John Wheelwright, Roger Williams, and Mary Dyer).

[49] *Id.* at 50 (discussing Sir Henry Vane's letter to John Winthrop urging the colonists to co-exist with other religions like the English Independents were doing).

[50] *Id.* at 50-51.

[51] *Id.* at 224-25.

[52] JERALD FINNEY, GOD BETRAYED, SEPARATION OF CHURCH AND STATE: THE BIBLICAL PRINCIPLES AND THE AMERICAN APPLICATION 230 (2008).

Religious freedom is not merely the right to believe whatever anyone wants to believe. Belief is in the mind, safe from even the most repressive government power. Religious freedom is the right to put religious beliefs into practice. That includes the right to spend money to support religious beliefs, as well as the right to refrain from spending money to support the religious beliefs of others. That makes the colonial experience in Massachusetts particularly instructive for the case presently before the court.

The Province of Massachusetts Bay was founded by Puritans intent on creating a just, even utopian, society. Throughout much of the 17th century dissenters were subject to serious sanctions, including heavy fines, if they did not attend the local Congregational church services on Sunday. Taxes were imposed on all inhabitants of a town for the support of the local Congregational church, whether certain individuals followed the church's teachings or not.

Restrictions on religious freedom in Massachusetts eased after the original charter was revoked and replaced with a royal charter that in theory guaranteed religious freedom. In spite of this, the colonial legislature in 1692 approved a law mandating that each town use general taxation to provide for an "able, learned orthodox minister" of the Congregational church.[53] In 1728, the legislature granted an exemption from taxes to support local Congregational ministers to Baptists and Quakers, but they had to get a special certificate

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[53] John D. Cushing, *Notes on Disestablishment in Massachusetts, 1780-1833*, 26 WM. & MARY Q. 169 (1969).

denoting their status from their town clerks.[54] The member of a minority religion in his home town "was required by law to support one church and by his conscience to support another."[55] As late as the early 1800s, some residents of Massachusetts who did not attend the Congregational church were seeing a portion of their local property taxes being spent to support the Congregational minister. (Massachusetts did not formally disestablish churches until 1833.)

Seen by the lights of today's cultural and legal standards in the United States, these burdens on dissenters from the established church of colonial Massachusetts seem onerous, even absurd. But the federal government's recent attempts to force all citizens of the country to pay for health insurance that covers the cost of birth control that can induce abortion is not substantially different. Recently, the federal government has begrudgingly carved out an exemption for certain religious institutions—who have gotten a sort of 21st century version of the special certificates once given to Baptists and Quakers in colonial Massachusetts. Only certain types of religious organizations qualify for the regulatory exemption, and that by government license. But the members of secular corporations who hold the same moral beliefs and have the same scruples of conscience have so far gotten no such relief.

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[54] *Id.* at 171-72.

[55] *Id.* at 171.

CONCLUSION

In keeping with the best of our legal traditions respecting religious freedom, which include the rights of religious dissidents to operate within the secular framework of civil corporations and private-sector associations, this Court should affirm the right to religious freedom from the abortifacient mandate for family-run businesses and closely-held companies.

Respectfully submitted,

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